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Supreme Court of the United States

No. 327.

UNITED STATES OF AMERICA AND HAROLD R. LOVE,
Petitioners-Appellants Below,

VS.

DAVID W. ONAN ET AL.,
Respondents-Appellees Below.

BRIEF

Supporting Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

OPINION OF THE COURT BELOW.

The Opinion of the United States Court of Appeals is shown in the Transcript of Record submitted [R. 48], the Order denying petition for rehearing [R. 62]. The Opinion and decree of the court of appeals is reported in 190 F. 2d 1.

JURISDICTION.

It is contended that the Supreme Court has jurisdiction to review the judgment in question and the Order denying

the petition for a rehearing, because of the statutory provisions and cases, set forth in the petition here at pages 2-3 which are hereby adopted and made a part of this brief. Substantial rights of petitioners are involved under Sections 231-232, Title 31, U. S. C. A.

STATEMENT OF THE CASE.

This has already been stated in the petition here, at page 1, under "Summary Statement of Matter Involved," and at page 3, "The Case Briefly Stated," hereby adopted and made a part of this brief.

POINTS—ASSIGNMENTS OF ERRORS.

These have already been stated in the petition here filed at page 4, and are hereby adopted and made a part of this brief.

ARGUMENT.

Point No. 1. The affidavit of prejudice met all the requirements, within the full letter and intent of Section 144, Title 28, U. S. C. A. The Appellate Court's Opinion does not show the text of the affidavit. The affidavit appears in the Transcript of Record [R. 1 (3-5)] and it, for convenience is reproduced here:

Affidavit of Prejudice.

Pursuant to Section 144, Title 28, U. S. Code, H. M. Roberts and H. R. Love, depose and state as affiants:

That they are the persons who brought the above entitled suit, pursuant to Section 232, Title 31, U. S. C. A., in name of the United States;

That affiants have a substantial interest in the successful prosecution of such suit;

That the matter is pending and has been before Judge Gunnar H. Nordbye upon motion made by and on the part of affiants, directed to the United States Attorney, based upon a claim of and showing of facts related to lack of due diligence on the latter's part, at which time Judge Nordbye denied such motion, overruling the same, subject to renewal at a later date;

That Judge Nordbye has a personal bias or prejudice against affiants and in favor of defendants in the suit, who are clients of an attorney at law, one Fryberger, an officer of this Court, but upon whom no service of summons and complaint in this suit has been made, no service upon any defendant having been made by the United States, for which the United States Attorney represents, in explanation thereof, that he considers the statute (232 T. 31 U. S. C. A.) provides a stay period of six months, within which no proceeding need be had:

That affiants state the facts and reasons for the belief that bias or prejudice exists are, that affiants have been informed and believe that Judge Nordbye, at the behest or instance of said attorney Fryberger, conferred with said attorney in the absence of affiants or representatives of the United States relative to matters related to certain interrogatories which had been served, and received by certain of defendants in this suit, pursuant to the provisions of the Rules of the

United States District Court, requiring answers by said defendants, that the purpose of said conference was to obtain advice and counsel of Judge Nordbye relative to the legal requirements relative to answering or not answering said interrogatories on the part of defendants receiving them, for the use of attorney Fryberger and said defendants, that as a result of such conference, advice and counsel received, defendants and all of them have failed to answer said interrogatories;

That, further, affiants aver, in a matter involving a suit under the same statute (232 T. 31 U. S. C. A.), a Judge of a United States Court was requested by one of the affiants undersigned, to advise in the absence of any defendant as to whether or not a certain thing or act could be done, or was prohibited, whereupon said judge refused to comment in any manner and referred affiants to the provisions of Section 454, Title 28, U. S. Code, as the reason for his refusal to comment or reply:

Affiants hereby certify that the herein stated affidavit is made in good faith.
September 5, 1950

H. M. Roberts
H. R. Love

Such affidavit alleges affiants had "a substantial interest" in the suit. It sets forth the personal bias and prejudice of the judge, the facts and reasons for the belief of existence of that bias and prejudice to be, that at the behest, or instance, of the defendants' counsel, alone with him, there was obtained from the judge, legal advice and counsel, relative to the *legal* requirements, as to answering

or not answering certain of the interrogatories served in the suit, for the sole purpose of the use of said defendants and their counsel as received from the judge which resulted in the failure to answer the interrogatories on the part of any defendant. Other orders of that judge [R. 1 (20)] have prevented the suit coming to an issue, he having relieved all defendants of any requirement of answer by quashing summons properly served. There is no denial of any part of the affidavit.

Such is a definite showing that the judge was practicing law, a considerable impropriety, culminating in prejudice to petitioners, and personally acting on the judge's part with bias in favor of defendants, to such an extent they all felt safe in refusing to reply to the interrogatories served under the Rules (Rule 33, F. R. C. P.). From this, sane, reasonable minds could only infer personal bias and prejudice of the judge.

The affidavit was filed September 6, 1950 [R. 1 (3)]. The next proceeding [R. 1 (20)] was had on September 28, 1950, when the judge issued an order, did not hear the Orders to Show Cause served the day before, with motion of defendants, but did hear their motion which was a part of said Order to Show Cause, issued and filed his order thereon of September 28, 1950 [R. 1 (20-21)]. Nothing appears in the Opinion of the appellate court which would indicate untimeliness of the affidavit, though the court, without ground or reason stated or finding of fact, concluded it was "untimely." It has been impossible to bring the case to issue or get it set for trial. Obviously the affidavit was timely.

The statute Section 144, Title 28, U. S. C. A., requires "certificate of counsel of record," that the affidavit is made in good faith. The affidavit states that requirement, and affiants were acting in their own interest and that of the United States of America under the statute (Sec. 232, Title 28) giving each a definite interest, had no other counsel than themselves, and acted as their own counsel, in their own interest.

This court in *Berger* v. *United States,* 255 U. S. 22, 41 S. Ct. 481, established the proposition that an affidavit of prejudice against a judge is subject to appellate review, and that subsequent orders of the judge against whom directed, are ineffective, if the affidavit be sufficient. In *Hurd* v. *Letts,* (1945) 89 Ct. App. D. C. 248, 152 F. 2d 121, it was stated:

> "* * * accordingly the question in all such cases is whether the affidavit asserts facts from which a sane, reasonable mind might fairly infer bias and prejudice of the judge * * *."

Point No. 2. To justify its ruling in Point 2, that a suit authorized by Sections 231-232, Title 31, U. S. C. A., must be instituted by an attorney at law practicing in the District Court, the court of appeals made only these representations [R. 53-54]:

> "* * * we do not think Congress could have intended to authorize a layman to carry on such suit as attorney for the United States but must have had in mind that such a suit would be carried on in accordance with established procedure which requires that

only one licensed to practice law may conduct proceedings in court for anyone other than himself * * * It is unthinkable that Congress by this Act (Section 232) intended laymen to practice law * * *."

That court refused to consider that the affidavit set forth affiants were the persons who brought the suit, had a substantial interest therein, given by Section 232, Title 31, U. S. C. A., to them as the persons who instituted the suit, up to a possible maximum of one fourth of any recovery. No defendant, nor the court of original jurisdiction, raised the point.

Congress by law clearly disposes of this point, in the statutes cited below:

"Section 1654, Title 28, U. S. C. A. In all courts of the United States the parties may plead and conduct their own cases personally * * *."

"Rule 17 (a) of the Rules of Federal Civil Procedure for the District Courts of the United States.

Every action shall be prosecuted in the name of the real party in interest * * * or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; *and when a statute of the United States so provides, an action for the use and benefit of another shall be brought in the name of the United States.*"

"Section 232, Clause (B), Title 31, U. S. C. A. * * * such suit may be brought and carried on by any person as well for himself as for the United States, and the same shall be at the sole cost and charge of such person, *and shall be in the name of the United States*

* * * Clause (C) * * * *Provided,* That if the United States shall fail to carry on such suit with due diligence within a period of six months from the date of its appearance therein, or within such additional time as the court, after notice may allow, such suit may be carried on by the person bringing the same in accordance with Clause (B) above * * *.

Clause (E) (2). In any such suit when not carried on by the United States as herein provided, the court may award to the person who brought such suit and prosecuted it to final judgment, or to settlement, as provided in Clause (B) out of the proceeds of such suit or settlement of any claim involved therein, which shall be collected, an amount not in excess of one-fourth of the proceeds of such suit or any settlement thereof, which in the judgment of the court is fair and reasonable compensation to such person for the collection of any forfeiture and damages; and such person shall be entitled to receive to his own use such reasonable expenses as the court shall find to have been necessarily incurred and all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in said court: *Provided,* That such person shall be liable for all costs incurred by himself in such case and shall have no claim therefor on the United States."

CONCLUSION.

Your petitioners respectfully submit, that on the record now before this court, the showing made in this petition and brief, there are matters calling for the exercise by this court, of its power of supervision, to the end that a Writ of Certiorari, under seal of this court, be directed to the U. S. Court of Appeals for the Eighth Circuit, to certify and send to this court, the matter, cause and record, and that this court review the decision and judgment below, and reverse the same, and give such other or further relief, as to this court shall appear just and proper.

Most respectfully,

HAROLD R. LOVE,
Petitioner for Himself and the United States of America,

Minneapolis, Minnesota.